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Prior Consistent Statements

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I. INTRODUCTION

At least two groups of readers are indebted to Professor David Dow for his article *KLM v. Tuller: A New Approach to Admissibility of Prior Statements of A Witness*.[1] The first group is comprised of teachers of evidence who have used his analysis in constructing their class presentation of *KLM v. Tuller*.[2] The second group is comprised of those who write about the law of evidence. For them Professor Dow has provided an excellent example of a writing form that is all too often overlooked—the extended commentary upon a particular case of more than routine interest to specialists. Such a commentary attempts neither an encyclopedic survey of all the cases in the area, nor an education of a reader with only a passing interest in the subject. It seems appropriate, in a symposium honoring Professor Dow, to return to the problem that was the subject of his article and to do so in the form which that article so well exemplifies—even if one invites invidious comparisons thereby.

The case chosen for such a commentary is *United States v. Iaconetti*.[3] The issue to examine is the impact of the Federal Rules of Evidence upon the admissibility of prior statements of a witness which are consistent with his or her trial testimony. Generally, it may be said that the unanimous common law view of the courts was that such statements could not be received as evidence of the facts asserted in them because admission for such a purpose would violate the hearsay rule.[4] If, however, the statements were received only to prove that they had been made, they would not be considered hearsay.

In theory, then, there was only one question to occupy the courts' attention: Under what circumstances would the making of a prior consistent statement by a witness be of sufficient probative value to warrant incurring the risks involved in admitting it? Essentially this was an issue of relevancy, although the hearsay rule

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1. 41 NEB. L. REV. 598 (1962).
2. 292 F.2d 775 (D.C. Cir. 1961).
3. 406 F. Supp. 554 (E.D.N.Y.), *aff'd*, 540 F.2d 574 (2d Cir. 1976).
4. 4 J. WIGMORE, EVIDENCE § 1132 (Chadbourn rev. 1972).

often became intertwined with it.[5] A considerable body of doctrine—which has been called "perplexing"[6]—evolved to answer this seemingly simple question. Not only were there differences of view among the states, but aspects of the law within a particular jurisdiction might be doubtful. For example, while it seems to have been agreed that such statements were not admissible until the credibility of the witness had been attacked, courts differed about what sorts of attack would open the door to this sort of corroboration.

Professor Edmund Morgan and the others responsible for drafting the American Law Institute's Model Code of Evidence eliminated the hearsay objection to the admission of declarations of any person who was "present and subject to cross-examination,"[7] thus overturning one of the few rules on which the courts had agreed. Under the Model Code the trial judge retained, however, his traditional power to exclude evidence if its probative value was outweighed by certain risks such as consuming unwarranted time, confusing the issues, or misleading or prejudicing the jury.[8] To the extent, therefore, that common law rules of exclusion and admission involved only matters of relevancy, the Model Code would not necessarily have changed the law. An approach similar to that of the Model Code was taken a decade later by the drafters of the first version of the Uniform Rules of Evidence.[9]

At first glance the Federal Rules of Evidence appear to essay a far less sweeping change in the judicial doctrine that prior consistent statements could not be received as substantive evidence. Rule 802 continues the rule excluding hearsay in the absence of an exception recognized by the Rules.[10] Rule 801(c) contains a fairly conventional definition of hearsay: " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Finally, Rule 801(d) exempts, by legislative definition, some—but only some—prior statements by a witness:

> A statement is not hearsay if
> (1) . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the

5. *See* Thomas, *Rehabilitating the Impeached Witness with Consistent Statements*, 32 Mo. L. Rev. 472, 473 (1967).
6. Annot., 140 A.L.R. 21, 23 (1942).
7. Model Code of Evidence rule 503(b) (1942).
8. Model Code of Evidence rule 303 (1942).
9. Uniform Rules of Evidence 45, 63(1)(1953).
10. Fed. R. Evid. 802: "Hearsay is not admissible except as provided by these rules or rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

> penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him . . . .[11]

Under the Federal Rules, as at common law or under the Model Code, there would be no hearsay problem if the prior statement were merely offered to show that it had, in fact, been made. In such a case, the statement would simply not be "hearsay" under the definition of Rule 801(c). Of course, the statement would have to be "relevant" under the definition of Rule 401[12] and of sufficient probative value to be admissible under Rule 403,[13] just as it had to be of sufficient probative worth at common law.

Moreover, the Federal Rules, like the common law and the earlier efforts at codification, admit as substantive evidence prior consistent statements of a witness that fit one or more exceptions to the hearsay rule,[14] but the statements are not admissible by virtue

11. The draft of the Rules published in 1969 recognized a fourth class of prior statements as exempt from the hearsay rule: "a transcript of testimony given under oath at a trial or hearing or before a grand jury." Proposed Rules of Evidence, Rule 8-01(c), 46 F.R.D. 161, 331 (1969) (Mar. 1969 Draft). This would have made such testimony admissible if consistent with the witness' trial testimony for non-rebuttal purposes and thus broadened the class of prior consistent statements admissible as substantive evidence. This provision was deleted in the 1971 Proposed Draft. *See* 51 F.R.D. 315, 413 (1971).
12. Evidence which is not "relevant" as that term is defined in FED. R. EVID. 401 is excluded by FED. R. EVID. 402. Evidence which is "relevant" is admissible unless some other rule excludes it. Rule 401 provides: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."
13. FED. R. EVID. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."
14. Of course, this would not be the case for those exceptions that require a showing of the declarant's unavailability, but most exceptions do not. Thus, for example, in a personal injury case, the plaintiff's statements about his physical condition to his doctor may be admitted as statements of physical condition by FED. R. EVID. 803(3), or as statements made for the purposes of obtaining medical diagnosis or treatment by FED. R. EVID. 803(4), even though they duplicate his on-stand testimony—subject to passing the tests of relevancy. An especially interesting exception is that for recorded recollection. Under the Federal Rules this exception would not be available unless the witness has "insufficient recollection to enable him to testify fully and accurately." *See* FED. R. EVID. 803(5). If the degree of impairment of memory required is substantial, there would be no on-stand testimony with which the memorandum could be consistent. However, it is possible that the Rule might make the statement admissible—at least so far as the hearsay rule is concerned—if a very slight impairment is shown. In such a situation, much

of their being prior statements of a witness; rather it is believed that the circumstances of their making provide some guarantee of trustworthiness.

Most importantly, Rule 801(d)(1)(B) appears to remove the bar of the hearsay rule for some, but by no means all, prior consistent statements of a witness, and in this respect the rule seems midway between the Model Code and the common law. The use of prior consistent statements to corroborate a witness who was attacked as having recently fabricated the story told at trial or as being improperly influenced or motivated was one situation in which the probative value of the statements was widely recognized at common law. Although such statements are admitted as substantive evidence under Rule 801(d)(1)(B), they were not so admitted at common law,[15] and the party against whom the statement was to be used was entitled to a limiting instruction.

There was, however, respectable authority for admitting prior consistent statements in other situations.[16] Under the Rules, it would appear that if the statements are offered for some purpose other than to corroborate a witness impeached on the grounds specified, Rule 801(d)(1)(B) does not operate to remove the statements from the definition of "hearsay" in Rule 801(c). Hence, Rule 802 would exclude them as substantive evidence, absent some exception.[17] Such statements appear to be admissible only as proof that they were made, just as they were at common law.

Whether the Federal Rules are, in fact, less hospitable to the widespread use of prior consistent statements as substantive evidence than the Model Code is the focal point of this article. While

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of the memorandum would also be a prior consistent statement. This would similarly be the case in those jurisdictions, like Colorado, that have dispensed with any requirement of impaired memory. *See, e.g.*, Jordan v. People, 151 Colo. 133, 376 P.2d 699 (1962). Again, the statement would have to pass a relevancy objection if it were to duplicate on-stand testimony.

15. *See* note 4 & accompanying text *supra*.

16. Apparently, Maryland and North Carolina would admit the statements irrespective of the nature of the impeachment. *E.g.*, McAleer v. Horsey, 35 Md. 439 (1872); State v. Dawson, 228 N.C. 85, 44 S.E.2d 527 (1947). Other jurisdictions, while not going so far, would admit the statements in certain defined cases. For example, if the witness had been impeached by evidence of a prior inconsistent statement, the matter was quite complex. Some courts would apparently then receive prior consistent statements. *See, e.g.*, Coates v. People, 106 Colo. 483, 106 P.2d 354 (1940); State v. Sibert, 6 Utah 2d 198, 310 P.2d 388 (1957). If the witness denied ever making the prior inconsistent statement, prior consistent statements might be admitted as bearing on that question, even though they would be excluded if the witness acknowledged making the prior inconsistent statement and thus removed that issue from the case. The leading case on this point is Stewart v. People, 23 Mich. 63 (1871) (Cooley, J.).

17. FED. R. EVID. 802.

the number of cases construing the Federal Rules of Evidence applicable to prior consistent statements of a witness is as yet too small to make confident predictions about the future course of the law possible, there are signs—of which the *Iaconetti* case is merely the most dramatic—that the Federal Rules may have achieved a more far-reaching effect than first appears.[18] Indeed, the Federal Rules, by a more complicated and circuitous route, may have reached the same result as the Model Code.

II. THE *IACONETTI* CASE

Iaconetti was a federal government-contract inspector. The prosecution contended that during a meeting on February 10, 1975, Iaconetti had told a man named Lioi, whose firm was a candidate for a government contract, that it would be hard to justify a favorable pre-award survey (which was indispensable to the firm's being awarded the contract) unless he received one percent of the contract price, or approximately $12,000. Lioi reported to the FBI that Iaconetti had made such a proposal and, at the instance of the FBI agent, conversations between Iaconetti and Lioi occurring on February 11th and February 24th were taped.[19]

Iaconetti initially claimed that he had been joking on February 10th. He later claimed, perhaps somewhat inconsistently, that Lioi had, without any solicitation, offered him a bribe of $1,000 and that during the taped conversations on February 11th and February 24th he was "leading Lioi on" to gather evidence against him.[20] The trial thus turned almost entirely upon the resolution of a question of credibility: Was the jury to believe Iaconetti's or Lioi's version of the February 10th conversation?

Iaconetti was convicted and moved for a new trial on the ground that the court had erroneously admitted as rebuttal evidence the testimony of Lioi's partner and attorney. Both testified that Lioi had told them on February 10th that the GSA inspector had asked him for a bribe. Judge Weinstein held that the testimony was

18. I believe I have read all of the cases decided under the Federal Rules dealing with the admissibility of prior consistent statements. No case has found reversible error in the admission of the statements. One case found it error to admit the statement but deemed the error harmless. United States v. Weil, 561 F.2d 1109 (4th Cir. 1977). Two cases, however, refused to reverse a conviction when the trial judge refused to admit the prior consistent statements. These cases may indicate that the expansive approach adopted in *Iaconetti* will not be followed everywhere. Or they may indicate that the trial courts will be free to chart their own courses. *See* United States v. Navarro-Varelas, 541 F.2d 1331 (9th Cir. 1976); Gerner v. Vasby, 75 Wis. 2d 660, 250 N.W.2d 319 (1977).

19. 406 F. Supp. 554, 555-56 (E.D.N.Y.), *aff'd*, 540 F.2d 574 (2d Cir. 1976).

20. *Id.* at 556.

properly received and denied the motion.[21] In a carefully organized opinion, Judge Weinstein first assessed the probative value of the evidence under Federal Rules 401 through 403, reasoning that Lioi's contacting both his partner and his attorney shortly after the February 10th meeting confirmed the hypothesis that something important happened at that meeting. It would be imperative to discuss the solicitation of a bribe with his partner and attorney in order to plan how best to meet what could prove to be a business crisis. Moreover, the testimony would bolster Lioi's credibility, making it more likely that Lioi's and not Iaconetti's version of the February 10th conversation was accurate.[22]

Turning next to Rule 403, which empowers the judge to exclude relevant evidence if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence,"[23] Judge Weinstein found no occasion for excluding the evidence. The jury had already heard Lioi's version of the February 10th meeting. "The emotional impact of hearing two brief confirmations of the solicitation was negligible. Furthermore, since the rebuttal testimony was restricted, by direction of the court, to repetition of defendant's statements to Mr. Lioi, as related by Mr. Lioi to the witnesses, there was no confusion, delay or waste of time."[24]

With respect to the hearsay question, it was apparent that the testimony of Lioi's partner and attorney would be "hearsay" as defined by Rule 801(c), and thus excluded by Rule 802, unless the qualification on that definition in Rule 801(d) or some exception to the hearsay rule were applicable. Judge Weinstein believed that there were three separate provisions in the Rules that authorized receipt of the statements.[25] First, he argued, Lioi's prior consistent statements could be admitted under Rule 801(d)(1)(B). The total variance between Lioi's and Iaconetti's accounts of the meeting of February 10th was "sufficient to constitute an implied claim that Mr. Lioi lied because of improper motive."[26] This motive would be to cover up his own attempt to bribe a government official.

Second, Rule 803(24) contains an exception to the hearsay rule for

21. *Id.* at 560.
22. *Id.* at 556-57.
23. FED. R. EVID. 403.
24. 406 F. Supp. at 557.
25. *Id.*
26. *Id.* at 558.

> [a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.[27]

Judge Weinstein found this exception also to be available. Circumstantial guarantees of trustworthiness equivalent to those of the named exceptions were provided by Lioi being available for cross examination and by the proximity of the statements to the alleged event, thus minimizing the risk of insincerity and faulty memory. Construing the requirement that the statement be offered to prove a "material" fact to mean that the fact must not be a trivial one, Judge Weinstein found this satisfied because of the pivotal importance of the issue of Lioi's credibility.[28] The statements were the most powerful evidence available in view of the conflict of testimony between Lioi and Iaconetti. To the extent that Iaconetti claimed to be joking, the statements were evidence of how Lioi understood Iaconetti's statements.

The government concededly gave no notice in advance of trial of its intention to offer these statements via the exception of Rule 803(24), but ample notice was given midway through Lioi's testimony and five days before his partner and attorney testified in rebuttal. Defense counsel did not request a continuance or make any reference to his inability to prepare to meet this testimony. Judge Weinstein declared that under a proper construction of the rule, "allowance must be made for situations like this in which the need did not become apparent until after the trial had commenced."[29] The shortness of notice was not the prosecution's fault and was not prejudicial.

As a third theory Judge Weinstein argued that Lioi's statements could be received as an admission by Iaconetti under Rule 801(d)(2)(C), which exempts from the definition of hearsay a statement offered against a party if the statement was "by a person authorized by him to make a statement concerning the subject."[30] Under this theory, by soliciting a bribe, Iaconetti implicitly

27. FED. R. EVID. 803(24).
28. 406 F. Supp. at 559.
29. *Id.* at 560.
30. *Id.* at 558 (quoting FED. R. EVID. 801(d)(2)(C)).

authorized Lioi to discuss the solicitation with his partner and attorney. In affirming Iaconetti's conviction, the Court of Appeals for the Second Circuit endorsed Judge Weinstein's construction of Rule 803(24);[31] it approved his construction of Rule 801(d)(2)(C) so far as Lioi's partner's testimony was concerned but not as applied to the attorney's testimony;[32] and it reserved the question raised by his construction of Rule 801(d)(1)(B).[33]

An exploration of Judge Weinstein's novel idea about authorized admissions is beyond the scope of this article; his other two theories regarding the application of the hearsay rule to prior consistent statements, as well as his analysis of the relevancy issues, raise questions about the effect of the Federal Rules.

III. ANALYSIS

A.

One of the most interesting aspects of the *Iaconetti* case is the care with which Judge Weinstein distinguished his analysis of the probative value of Lioi's prior statement from his discussion of the hearsay issues raised by the proffer of those statements. As a result certain features of his analysis emerge more clearly then they otherwise might. The probative value of the statements was assessed before their status under the hearsay rule was resolved. At common law, the considerable discussion of the probative value of such statements was based upon the assumption that the statements could not be received as substantive evidence.[34] The probative value to be weighed in such circumstances was the probative value of the fact of the statement's having been made, the fact of consistency.[35] In strict theory, if the statement may also be received as proof of the facts asserted in it, the probative value of the statement as substantive evidence must also be weighed.

As a practical matter, however, it is doubtful whether much turns on this distinction. The jury has heard the witness tell his

31. 540 F.2d at 577.
32. *Id.*
33. *Id.* In order for Judge Weinstein's theory to fit the case, one first has to resolve the issue of credibility in favor of Lioi. To put it another way, one has to decide that Iaconetti is guilty. In this sense the ultimate issue of fact in the case coincides with the preliminary issue of fact. Either the judge must decide, on the basis of what he knows, that it is more probable than not that Lioi's version of the February 10th meeting is correct, *see* FED. R. EVID. 104(a), or he must admit the statement if a reasonable jury could conclude, by the appropriate standard, that Lioi's version was correct.
34. *See* text accompanying notes 3-6 *supra.*
35. *See* Gooderson, *Previous Consistent Statements*, 26 CAMBRIDGE L.J. 64, 79 (1968).

story from the stand. They will likely believe that statement unless contradictory or impeaching evidence is presented. Without a reason to disbelieve the statement, the jury will have little interest in prior consistent statements regardless of the use that may be made of them. If the jury is given some reason to disbelieve the on-stand testimony, it is difficult to imagine cases in which the statements would be of value as substantive evidence but in which they would not be of greater value in bolstering the on-stand testimony.

Judge Weinstein's decision to treat the relevancy issue first may be regarded as implicit recognition that any liberalizing of the hearsay rule that may be accomplished by the Federal Rules will probably not affect the evaluation of the evidence under Rules 401 through 403. To the extent, therefore, that the common law cases may be read as passing only upon the relevancy of the statements, the changes wrought in the hearsay law by the Federal Rules would not necessarily render that learning obsolete.[36]

B.

Judge Weinstein, however, neither invoked any pre-Rules precedent nor expressly employed such pre-existing doctrine. His decision is thus also consistent with the view that the Federal Rules have liberated the courts from an obligation to adhere to the results of particular pre-Rules precedents. While it is true that Rules 401 through 403 incorporate the traditional common law standards, the Rules do not necessarily endorse any previous application of such standards. A court could, without censure, follow a pre-Rules precedent on the ground that the earlier court reached its result by employing the very analysis codified in the Rules; or a court might regard the Rules as inviting it to re-examine prior holdings to see if they in fact square with the standards.[37] The omission of any pre-Rules cases from Judge Weinstein's opinion is some evidence that he took the latter approach, but it would be even more impressive evidence if his analysis departed from the common law.

In view of the conflicts among the jurisdictions, it is, perhaps, a misnomer to speak of prior law, but one matter was plain—prior consistent statements were not admissible to corroborate a witness whose credibility had not been attacked.[38] The logic of this

36. *Compare* FED. R. EVID. 401-403 *with* MODEL CODE OF EVIDENCE rule 303 (1942).

37. *See* Travers, *An Essay on the Determination of Relevancy Under the Federal Rules of Evidence*, 1977 ARIZ. ST. L.J. 327, 334.

38. 4 J. WIGMORE, *supra* note 4, § 1124. It is worth noting this limitation seems to have been imposed in North Carolina and Maryland, two states that other-

view is quite clear. Notwithstanding the fact that any showing of consistency has some tendency to enhance the credibility of a witness, a witness who has not been impeached does not need to have his credibility enhanced. The jury will have no interest in the statements. Presumably this would be true even if the witness were a party and interested in the outcome.[39] Hence, absent some impeachment, prior consistent statements would be of insufficient probative value to be admitted.

Once the credibility of the witness has been attacked, the matter changes. The jury is now interested in evidence that bolsters the witness' credibility. The issue becomes whether, given the type of attack, a prior consistent statement has this effect. This was the issue that split the courts.[40] Some courts—a very few—would admit such statements regardless of the nature of the impeachment. Other courts found the statements inadequate to blunt certain types of impeachment, and thus inadmissible. In drawing these

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wise were wide open as far as the use of prior consistent statements were concerned. *See* Annot., 140 A.L.R. 21, 27-32 (1942), *supplemented*, Annot., 75 A.L.R.2d 909, 925-27 (1961).

39. Thomas, in discussing Missouri law, notes a particular reluctance on the part of the Missouri courts to receive corroborating statements by party-witnesses. *See* Thomas, *supra* note 5, at 498-500. Wigmore notes a similar reluctance elsewhere. *See* 4 J. WIGMORE, *supra* note 4, § 1133. This seems strange since the obvious interest of a party would seem to be a ground for disbelief of his testimony even in the absence of impeaching evidence. This may be a recognition of the danger of canned statements. *See* text accompanying notes 73-74 *infra*. It may also, in some jurisdictions, simply be a reflection of the fact that a party's motive to fabricate may arise so early as to make it difficult to find prior consistent statements uttered before the motive arose.

It should be noted, however, that courts do not always insist that the statements antedate the corrupting evidence. Consider, for example, United States v. Simmons, 567 F.2d 314 (7th Cir. 1977), in which it was alleged that the witness falsely implicated the defendant in order to terminate his own questioning so he could be taken to a hospital for a drug treatment. *Id.* at 321. It appears, however, that the witness would have been laboring under the same compulsion at the time he made the prior statements offered to corroborate his testimony. Compare the report of United States v. Lanier, 3 FED. R. EVID. NEWS 78-82 (8th Cir. June 7, 1978) (No. 77-1448). The report suggests that the court often has some discretion in deciding when the motive to falsify arose. Even if the motive may have pre-dated the statement, if subsequent events are likely to have impressed upon the witness the gravity of his situation, the statements might be received.

40. Thomas points out that the courts did not always recognize that this was a problem of relevancy. Thomas, *supra* note 5, at 473-74. One way in which the hearsay and the relevancy issues overlapped lay in the fear that the witness would "corroborate himself." This fear is evidenced by the notion that the jury might not appreciate the fact that a prior consistent statement by a witness, considered as substantive evidence, rested as much on the credibility of the witness as his on-stand testimony, and the jury would therefore tend to overvalue the evidence. It may be doubted whether juries are really that dense.

lines, the courts were often hindered by considerable doctrinal fuzziness.

C.

If a witness has simply been contradicted by another witness, obviously the jury will have to resolve the conflict in testimony, but it is doubtful that evidence of a prior consistent statement by one of the witnesses will be of much help. A moment's reflection should suggest to most jurors that the witness must have told the story at least once before or he would not be on the stand telling the story now. The presentation of prior consistent statements by both witnesses would either leave the matter a stand-off, or favor the witness who, by accident or design, told the most persons his story.[41] In the absence of some other impeaching evidence, a jury would likely resolve the conflict on the bases of the intrinsic believability of the stories and the witnesses' demeanor. The admission of prior consistent statements would shed little light on either. Accordingly, most courts rejected the prior consistent statements if no impeachment other than contradiction had been attempted.[42] Despite occasional decisions to the contrary,[43] any decision that the Federal Rules of Evidence authorized the admission of prior consistent statements upon a showing of conflict in the testimony would be construing the Rules to dramatically alter pre-existing doctrine.

Although there is a narrow ground upon which the statements in *Iaconetti* may be found probative,[44] Judge Weinstein appears to adopt the view that contradiction is enough under the Federal Rules, finding that the case is so dominated by the issue of the credibility of Lioi and Iaconetti regarding the February 10th meeting that any evidence bearing on this issue is of value. The road to this conclusion was smoothed considerably by the Rules' handling of relevancy issues. The term "relevant" as applied to evidence is so defined as to make relevant any evidence having any tendency whatever to make a fact of consequence more probable or less probable than it would be without the evidence. In effect, evidence is "relevant" if it has any probative force whatever.[45] This

41. A similar observation is made by Wigmore. *See* 4 J. WIGMORE, *supra* note 4, § 1127.
42. *E.g.*, Inman Bros. v. Dudley & Daniels Lumber Co., 146 F. 449 (6th Cir. 1906); Commonwealth v. Brown, 23 Pa. Super. Ct. 470 (1903).
43. Especially in Maryland and North Carolina. *See, e.g.*, Cooke v. Curtis, 6 H. & J. 93 (1823); March v. Harrell, 46 N.C. (1 Jones) 329 (1854). Other jurisdictions have also flirted with this idea, but cases to the contrary usually also exist in these jurisdictions.
44. *See* § III-D *infra*.
45. FED. R. EVID. 401.

in turn means that all prior consistent statements are "relevant" because the fact of consistency itself has some tendency to corroborate the testimony. But this, of course, would be true in the absence of a contradiction—or any other attack on the witness' credibility.

The very expansive definition of "relevant" evidence means that a greater burden is placed upon the judge's discretionary power to exclude under Rule 403.[46] Presumably those common law cases that rejected prior consistent statements did not do so on the ground that such statements were utterly lacking in probative value but on the basis that the mere fact of consistency was not of sufficient worth to warrant cluttering up the trial except in certain special cases. A like analysis under the Federal Rules would result in the exclusion of the evidence under Rule 403. Nevertheless Judge Weinstein found no error in admitting the statements and, again, Rule 403 itself contributed to that result.[47] In the first place, Rule 403 does not appear to authorize exclusion of relevant evidence unless its probative value is "substantially outweighed" by the listed factors. Moreover, even in such situations, exclusion seems discretionary though there can be little doubt that the discretion may be abused. Thus Rule 403 is skewed in favor of admissibility.

Moreover, the very listing of the countervailing factors in the rule enjoins upon the court a somewhat more precise delineation of the risks of admitting the statements than was required by judicially devised doctrine. Taking these in order, Judge Weinstein reasoned that the rebuttal testimony could hardly be more inflammatory, *i.e.*, prejudicial, than Lioi's on-stand recitation of his story. Judge Weinstein couched this portion of his analysis in terms that suggest the conclusion might have been different if the prior statements had somehow been brought to the jury's attention before Lioi told his story on the stand, but Judge Weinstein's analysis would seem applicable in any situation in which the statements were offered after the witness had testified. Likewise Judge Weinstein found the other factors—such as confusion of the issues or waste of time—unimportant because he confined the partner and attorney to testifying to the statements and only the statements.[48] Again this reasoning would seem available whenever a prior consistent statement is offered. While Judge Weinstein's opinion might suggest ways of confining the witness, it offers no theory for screening out statements on relevancy grounds.

46. FED. R. EVID. 403.
47. 406 F. Supp. at 557.
48. *Id.*

To be sure, the opinion is dealing with a motion for a new trial. To the extent that admission of prior consistent statements generally may be thought to involve serious risks of undue time consumption, those risks are more impressive when the judge is making an initial decision whether to admit than they are when a decision to admit is under attack on appeal or on a motion for a new trial. Accordingly, the precedential force of the case may be greater in such retrospective proceedings although Judge Weinstein seems not to place much weight on the fact that the admission of unduly time-consuming evidence can hardly be a ground for retrying the whole case.

One reading of the opinion, then, is that under the Federal Rules prior consistent statements are always "relevant" under Rule 401 and that, in the usual case, there are no substantial counterweights that would call for the exclusion of the statements under Rule 403. Hence, so far as the relevancy calculus is concerned, the statements will customarily be received.[49] A variation of this reading admits that waste of time may be a serious problem that should be considered by the trial court in making its initial ruling but can hardly be a basis for upsetting what was done either on appeal or in a motion for a new trial.

D.

Judge Weinstein also seems to offer a narrower ground of decision. If Lioi's version of the February 10th meeting were correct, one would naturally expect him to consult his attorney and partner. The failure to present evidence of such a consultation might lead the jury to believe that it did not occur and thus discredit Lioi's story. Rule 801(d)(1)(B) acknowledges the value of prior consistent statements in rebutting, *inter alia*, a charge of recent fabrication.[50] There appear to have been two types of cases in which the courts would deem such a charge to have been made. If the witness was impeached by evidence that he recently obtained an interest in the case, or developed a bias for or against a party, or was brought under a party's influence, it might be implied that his testimony was recently "fabricated" to further the interest, bias, or influence.[51] Thus, if it could be shown that the witness began bar-

49. One exception occurs in the cases in which the witness describes a prior identification of the defendant from a book of mug shots, thus revealing the defendant's criminal record. A good discussion of this problem may be found in Gooderson, *supra* note 35, at 74-81.

50. *See* text accompanying note 15 *supra*.

51. *E.g.*, United States v. Lombardi, 550 F.2d 827 (2d Cir. 1977) (under Federal Rules); Brown v. State, 262 Ark. 298, 556 S.W.2d 418 (1977) (statute based on Federal Rules).

gaining with the government for a reduction in his sentence shortly before trial, the implication would be that the witness contrived his testimony to fulfill his part of the deal.[52] Or if it could be shown that the witness was in need of drug treatment and was taken for treatment after giving a statement implicating the defendant, the implication would again be that the story was fabricated to order.[53]

Such cases could also be described as cases in which the impeaching party also charged improper influence or motive. Indeed, Wigmore argued that such cases should, in the interest of clarity, not be called cases of recent fabrication. This term he would confine to another group of cases.[54] If it could be shown that a witness discussed the subject matter of his testimony on some previous occasion and omitted to mention certain facts to which he later testified, and it would have been natural to mention the facts at the earlier time, it was possible to account for the discrepancy by hypothesizing that facts omitted earlier were invented for trial. The use of prior consistent statements to rebut this hypothesis was widely recognized.

Had evidence been offered in *Iaconetti* that Lioi had not even mentioned Iaconetti's solicitation of a bribe on or around February 10th, then it would have been fairly orthodox to receive evidence of prior statements to rebut the inference of recent fabrication. Such rebuttal testimony might relate to the occasions on which Lioi was alleged to have been silent—thus attacking directly the claim of silence—or to other, roughly contemporaneous occasions—thus attacking the inference of recent fabrication.

The problem is that in *Iaconetti*, so far as the opinion reveals, defense counsel had not introduced such evidence or in any other way suggested that Lioi's testimony had been recently fabricated at the time that the statements were offered in rebuttal. However, there is support for allowing such a charge, which might, for example, be suggested in summation, to be anticipated if the impeaching inference is one that the jury is likely to draw even in the absence of evidence supporting it.[55] It might, therefore, seem that a court that was of a mind to limit *Iaconetti* could stress this view of the case: the statements did not pass muster under Rules 401

52. United States v. Scholle, 553 F.2d 1109 (8th Cir. 1977).
53. United States v. Simmons, 567 F.2d 314 (7th Cir. 1977).
54. Wigmore actually preferred the phrase "recent contrivance" to the more common "recent fabrication," but nothing substantive seems to turn on the choice of words. *See* 4 J. WIGMORE, *supra* note 4, § 1129.
55. For example, such an inference was once thought natural if the prosecutrix in a rape case did not make a contemporaneous complaint. For an argument that counsel should be permitted generally to anticipate the impeachment, see Gooderson, *supra* note 35, at 86-89.

and 403 because those Rules would pass any prior consistent statement, even by an unimpeached witness; rather, the statements in *Iaconetti* were of special value because an impeaching inference would likely have been drawn by the jury upon any suggestion by defense counsel and, hence, a need to counter such an inference was present.

While this latter view would provide an alternative reading of *Iaconetti*, it is doubtful that it would really be a narrower one. It is true that the jury might have doubted Lioi's story had it heard that he said nothing about the bribe when it allegedly happened, but it is not certain that there is anything special about the situation in *Iaconetti* that would peculiarly incline a jury to infer that Lioi had been silent and then to make the further impeaching inference of recent fabrication. There is thus nothing special that would call for anticipating impeachment. If this is correct, then this reading of the opinion provides a theory of relevancy that is almost as expansive as the previous reading.

E.

Judge Weinstein's treatment of the hearsay issue is at least equally far-reaching. Rule 801(d)(1)(B) admits prior consistent statements as substantive evidence when offered to rebut a charge of "recent fabrication" or "improper influence or motive." The Advisory Committee's Note indicates that the rule allows their use as substantive evidence only if those statements would have been admissible under the prior law to rebut the charges.[56] It may be argued, therefore, that in construing this rule the logic if not the precedents of the pre-Rules law must be honored.

As was true in the portion of the opinion dealing with the relevancy of the statements, Judge Weinstein did not employ any earlier cases in construing Rule 801(d)(1)(B), but this should no longer be surprising. The notion that Lioi's earlier statements might be introduced to rebut an anticipated charge of recent fabrication,[57] although not tied to Rule 801(d)(1)(B), suggests a willingness to employ concepts in an innovative fashion. It might, in fact, have been possible to bring the statements under Rule 801(d)(1)(B) had this analysis been pushed a bit further; the fact that it was not may be further evidence that Judge Weinstein wanted to establish an even broader theory of relevancy under the Rules.

In any event, Judge Weinstein's conclusion that the conflict between Iaconetti and Lioi was enough to imply a charge that Lioi

56. FED. R. EVID. 801(d)(1)(B), Adv. Comm. Note.
57. *See* § III-D *supra*.

was improperly motivated goes beyond the bulk of the prior decisions and the logic behind the pre-Rules law. The question is whether such a conclusion is improper because it expands the rule beyond the scope intended by the drafters or whether Rule 801(d)(1)(B) might not invite such an expansive approach.

Rule 801(d)(1)(B) may be intended to serve either or both of two purposes. The most widely recognized situations permitting the use of prior consistent statements under the pre-Rules case law were those in which it was suggested that the witness was under improper influence or was improperly motivated and those involving the suggestion that the trial testimony was a recent fabrication,[58] but, of course, the statement was not admissible as substantive evidence. Presumably the party opposing the introduction of the statement would be entitled to have the jury instructed as to the use it might make of the statement.[59] An instruction similar to that criticized in the California Evidence Code should suffice: "Ladies and gentlemen, you are not entitled to consider the statement as proof of the facts stated in it, or to inquire whether the witness spoke the truth on that occasion, but you may consider the statement for whatever light it sheds on the question whether the witness is telling the truth when he asserts the same facts on the stand."[60] Absent Rule 801(d)(1)(B), a similar instruction would have to be given under the Federal Rules as well. It is really doubtful that such an instruction could be productive of anything other than jury confusion. The drafters might well have felt that the statements were going to come in anyway, and that it would be a blessing for all concerned if such an instruction could be dispensed with. To the extent that this was the purpose of Rule 801(d)(1)(B), to the extent that the rule is a study in resignation, perhaps it should be given a grudging construction.

There is, however, another view. The Advisory Committee's Note also states, "The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."[61] If one ignores for the moment the language about "opening the door," the most natural reading of this sentence is that there is no valid hearsay objection to receiving prior consistent statements as substantive evidence,

58. *See* text accompanying notes 50-53 *supra*.

59. Leading cases include Commonwealth v. Jenkins, 76 Mass. (10 Gray) 485 (1858); People v. Jung Hing, 212 N.Y. 393, 106 N.E. 105 (1914).

60. CAL. EVID. CODE § 1236, Comment—Law Revision Comm'n (West 1966): "It is not realistic to expect a jury to understand that it cannot believe that a witness was telling the truth on a former occasion even though it believes that the same story given at the hearing is true."

61. FED. R. EVID. 801(d)(1)(B), Adv. Comm. Note.

at least when offered for the purposes specified in Rule 801(d)(1)(B). This, in turn, raises the question whether Rule 801(d)(1)(B) could be thought to define a class of prior consistent statements in which on-stand cross examination was particularly useful in protecting against hearsay risks. If there is nothing special about these statements, the judgment that no valid hearsay objection to them exists could be used to support the receipt of any prior consistent statements as substantive evidence.

F.

When Professor Morgan and his associates were drafting the Model Code they concluded that there was no valid hearsay objection to receiving any prior statements by a witness who was "present and subject to cross examination."[62] In justifying this conclusion in his Foreword to the Model Code, Morgan identified three possible reasons for preferring on-stand testimony to declarations made at a time nearer the events described and under circumstances less artificial than those of a courtroom: (1) the earlier statement was not made under oath; (2) the earlier statement was not subject to cross examination at the time it was made; and (3) the jury could not observe the demeanor of the declarant at the time the statement was made. None of these reasons could adequately rationalize the hearsay rule and its exceptions, which Morgan regarded as a hopeless tangle of inconsistencies and conflicting assumptions.[63]

Of the three, only the objective of providing the party against whom the statement was offered the opportunity to test the declarant by cross examination seemed to have much force. So far as the oath was concerned, only one hearsay exception required that the out-of-court declaration be made under oath.[64] Not only did other exceptions countenance the admission of unsworn statements, but out-of-court statements given under oath would not become admissible thereby. Moreover, "unfortunate as it may be, it is now generally recognized that the oath has lost most of its efficacy as a sanction."[65] Morgan doubted the value of demeanor evidence *per se*.[66] Demeanor while undergoing cross examination

62. Morgan, *Foreword* to MODEL CODE OF EVIDENCE, 36, 49 (1942).
63. *Id.* Morgan remained unreconstructed, even after the failure of the Model Code. He made a similar demonstration of the grotesqueries of the hearsay rule in E. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 169-95 (1956).
64. The exception for reported testimony. *See* FED. R. EVID. 801(d), Adv. Comm. Note.
65. Morgan, *supra* note 62, at 36-37.
66. *Id.*

could be considered an aspect of the goal of providing an opportunity to cross examine.

If the use of the out-of-court statement required one to treat the declarant as a witness, Morgan had no doubt that a well conducted cross examination could be helpful to the jury, but he tended to be skeptical of some of the exaggerated claims made for it. Morgan noted that there were few documented instances of cross examination unmasking deliberate perjury; instead, its chief value seemed to be that it "frequently disclose[d] imperfections as to observation and memory"[67] in testimony given by essentially honest witnesses. The cross examiner would reveal slips in memory or defects in perceptive ability that might weaken the force of the witness' testimony. Furthermore, the way in which the witness used language could be tested to reveal possibly misleading articulations. Of course, if the opponent declined to object to hearsay when offered, the jury was entitled to use it for whatever value it might have, presumably on the assumption that jurors could appreciate the dangers in using hearsay.[68]

If the declarant were present and subject to cross examination, Morgan believed that no hearsay objection to the receipt of his prior statements was valid.[69] The witness could be interrogated about the statement and, by hypothesis, had testified as to the facts asserted in it. If the prior statement were inconsistent with his testimony, he could be forced to take a position about the statement and be questioned with the jury observing his demeanor. If the statement were consistent with his on-stand testimony, the witness would have, in effect, adopted the earlier statement under oath. Cross examination would necessarily attack the statement, and again the witness' demeanor could be observed.

In recent years this analysis, as applied to prior inconsistent statements of a witness, has come under attack, but some of the most articulate critics of the use of prior inconsistent statements as substantive evidence do not apply their strictures to prior consistent statements.[70] There are, however, some arguments against the use of such statements that need examining.

G.

First, there is the oft-quoted remark that subsequent cross examination is not a substitute for contemporaneous cross examina-

67. *Id.* at 37.
68. A leading general discussion of this is Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331 (1961).
69. Morgan, *supra* note 62, at 36-50.
70. *E.g.*, R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 480 (1977).

tion because "[f]alse testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth."[71] If the earlier statement is inconsistent with the witness' trial testimony, it is possible to turn the metaphor around and point out that the earlier statement has softened like an asphalt road in August.[72] When the trial testimony is consistent with the earlier statement, there has been no such "softening." But if the earlier statement was false and has "hardened," this would mean that the on-stand testimony has become impervious to cross examination. In other words, if a person tells a false story and is subject to immediate cross examination, it may be a good bit easier to get him or her to change the story than it would be if the cross examination is deferred. To the extent that this is so, it is an argument that casts doubt on almost all on-stand cross examination since, by hypothesis, it will have been deferred. But the whole hearsay rule rests upon the notion that on-stand cross examination is of great value, and there is thus an internal contradiction in justifying use of the hearsay rule to exclude prior statements with such a theory.

There is, however, a more serious objection. Admitting all prior statements by a witness as substantive evidence might encourage a lawyer to have canned statements prepared—preferably in written form—by each witness he or she intends to call. Professor Dow put this objection about as well as possible:

> If any prior statement of a witness is to be regularly admitted, the pressure to secure such statements, which is now substantial, will inevitably be increased. The trial will certainly tend to be cluttered with prior statement after prior statement, written and oral, drawn not with a view to preserving the memory of the witness or the lawyer but with a view to making the best case before the jury or to presenting the jury with a written brief.[73]

This fear is entitled to respect, and we may all agree that the scenario that Professor Dow envisages is not an attractive prospect. But if admission is limited to statements of a witness who has been successfully impeached and the impeachment has also sapped the force of the earlier statement, the pressure may not be as great. Such a practice might, in the words of Professor Maguire, be made to "recoil dreadfully upon the litigant whose lawyers had carried out the practice."[74]

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71. State v. Saporen, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939).
72. *E.g.*, California v. Green, 399 U.S. 149, 159 (1970) (White, J.).
73. Dow, *supra* note 1, at 607.
74. J. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 63 (1947).

It would certainly appear to be true that certain assaults upon the witness' credibility would successfully undermine any prior consistent statements the witness may have made. For example, if the cross examination raised serious doubts about whether the witness really perceived the event described—as by showing that the witness was quite nearsighted and, perhaps, not wearing glasses—those doubts would also attach to prior statements, even ones made soon after the event. Likewise, if it could be shown that the witness' use of words created a misleading impression as to the nature of the testimony, a similarly worded prior statement would also be clarified.[75] In these situations, the prior consistent statements being of no rehabilitative use, there would be less pressure to secure canned statements. If offered, they might not even be admitted although the broad view of the relevancy of such statements espoused in *Iaconetti* would require exclusion of fewer statements on that ground.[76] In any case, the opportunity for cross examination called for by the hearsay rules seems to have been afforded.

Conversely, there are lines of impeachment that may weaken the impact of a witness' testimony but that do not have a like effect upon prior consistent statements. For example, if it could be shown that a prosecution witness was in custody on another charge, the jury might have doubts about the witness' sincerity. A consistent statement made prior to the witness' arrest would not be subject to the same doubts, and as Rule 801(d)(1)(B) recognizes, these were the very situations in which evidence that the statement had been made would usually be received. Hence, pressure to obtain such statements must already exist in those cases.[77] So far as the hearsay risks are concerned, the hearsay rule is not a rule that guarantees the cross examiner maximum destructive impact, but one that affords the opportunity to test the witness. If, in availing him or herself of that opportunity, counsel selects a line of attack that does not have much impact upon the

75. Morgan's favorite example of the witness who used words in a misleading manner was drawn from the two ballistics experts who testified against Sacco and Vanzetti. He used this illustration on several occasions, but perhaps his most interesting treatment is to be found in his portion of L. JOUGHIN & E. MORGAN, THE LEGACY OF SACCO AND VANZETTI 85-90 (1948).

76. This statement needs some qualification. Some courts are willing to admit statements made after the witness had an incentive to fabricate and, one would think, any loss of confidence in the witness would attach to these statements as well. *See* Note, 45 CALIF. L. REV. 202 (1957).

77. The leading case of People v. Singer, 300 N.Y. 120, 89 N.E.2d 710 (1949), involved such a situation. For a post-Rules case, see United States v. McGrath, 558 F.2d 1102 (2d Cir. 1977), in which the pressure was a perjury indictment brought against the witness because of earlier inconsistent statements under oath.

witness' earlier statements, perhaps the impeaching data is not all that important.

There may be special problems with written statements that should be dealt with by the court. It is possible to admit the statement but not permit the writing to go to the jury. Such a solution was, in fact, codified so far as statements received under the recorded recollection exception were concerned,[78] largely in response to the fear that witnesses, if counseled early enough, would provide written statements for the jury and then claim some impairment of memory. Surely the courts retain discretion to impose similar limitations in analogous circumstances when the same risk is posed.

H.

If this analysis is correct, it appears that subsequent cross examination is adequate regarding any prior consistent statement, for whatever purpose it may be offered. There is nothing about prior consistent statements offered for the two rebuttal purposes mentioned in Rule 801(d)(1)(B) that make them uniquely susceptible of being probed by later cross examination. It is a fair reading of the Advisory Committee's Note that the drafters of the Rules accepted this view for statements offered for the specified purposes of "recent fabrication or improper influence or motive."[79] The limitations of Rule 801(d)(1)(B) do not, however, delineate a class of prior consistent statements that is different from other similar statements in any respect that is meaningful so far as the hearsay rule is concerned. One response may be to give Rule 801(d)(1)(B) the broadest possible reading even if this means cutting loose from the cases antedating the Rules. To the extent that Judge Weinstein's opinion embodies this response, his innovative construction of the rule may be entirely justifiable.

There is, however, one qualification to this conclusion. It seems that the opposite party's "opening the door" was felt by the drafters to be a prerequisite to the admissibility of these statements. The argument could be made that only in such circumstances did the drafters conclude that "no sound reason is apparent" why the statements should not be received as substantive evidence. If some volitional act by the opponent was intended to be a prerequisite, the opponent ought to be aware of engaging in that act. To the extent that Rule 801(d)(1)(B) is construed as admitting as substantive evidence only those prior consistent statements that had theretofore been received to rebut charges of recent

78. FED. R. EVID. 803(5).
79. FED. R. EVID. 801(d)(1)(B), Adv. Comm. Note.

fabrication or improper motive or influence,[80] the opponent could know in advance whether he was "opening the door." It might, therefore, be argued that the construction of the rule in *Iaconetti* is not properly sensitive to this qualification upon the drafters' conclusion about the absence of hearsay dangers.

It exaggerates the clarity of the pre-Rules law to so conclude, however. There was considerable vagueness in the cases as to when such a charge would be implied and what prior consistent statements were made admissible thereby. It cannot really be contended that there was anything like a uniform federal rule on the matter.[81] Thus, while it is true that a construction of the Rules that adopted an innovative approach as to when statements would be admissible might, on occasion, mean that an opponent was somewhat surprised by the consequences of a line of attack on a witness, freezing the terms with reference to the law as it existed on the date of adoption of the Federal Rules would not eliminate such surprises and would run counter to the general, evolutionary objectives of the Rules in the bargain.[82]

Moreover, this notion of "opening the door" does not appear to be meaningful so far as the policies of the hearsay rule are concerned. It is not the "opening of the door" that makes the opportunity for cross examination of the witness adequate to eliminate the hearsay risks of admitting the prior consistent statements. It would seem, therefore, that this language does not qualify the conclusion that Rule 801(d)(1)(B) embodies the belief that there is no valid hearsay objection to the use of such statements.

I.

There is a further reason why Judge Weinstein's somewhat cavalier treatment of prior learning may be appropriate. There were two types of cases in which the charge of recent fabrication was thought to be implied: the cases in which the impeaching party produces evidence of bias, interest, or pressure operating upon the witness; and the cases in which the witness made a prior statement that was silent in material respects, or in which the witness was entirely silent under circumstances that should have induced a statement.[83] The reference in Rule 801(d)(1)(B) to "recent

80. *See* § III-D of text *supra.*

81. *Compare, e.g.*, Coltrane v. United States, 418 F.2d 1131 (D.C. Cir. 1969) (hostile to the receipt of such statements) *and* Dowdy v. United States, 46 F.2d 417 (4th Cir. 1931) (refusing to follow the wide open North Carolina rule) *with* United States v. Zito, 467 F.2d 1401 (2d Cir. 1972) *and* Hanger v. United States, 398 F.2d 91 (8th Cir. 1968).

82. *See* FED. R. EVID. 102.

83. *See* § III-D of text *supra.*

fabrication" must encompass both lines of cases, or the words would add nothing to the reference to improper influence or motive.

The difficulty begins when one considers the cases in which the witness is impeached by the use of a prior inconsistent statement. The courts were divided about the subsequent use of a prior consistent statement to rehabilitate in such cases. Some courts did allow the statements on the not-too-satisfactory ground that consistent statements should be allowed on the witness' behalf just as inconsistent statements may be used to impeach.[84] Other courts pushed the analysis a bit further. If it was admitted that the inconsistent statement had been made,[85] the witness was impeached by the fact of the inconsistency, by the fact of having "blown hot and cold" on the issue.[86] A showing that the witness had told a consistent story on yet a third occasion did not eliminate the inconsistency and thus did not rebut the impeaching evidence.[87]

The same argument can be made about the witness' silence on an earlier occasion. It may be true that the failure to relate certain facts earlier might be deemed an attempt to deprive the other side of an opportunity to investigate the story. This might especially seem to be the case if a witness fails to tell the police certain facts.[88] Yet telling a story at variance with the witness' trial testimony would seem no less a concealment of the facts now told but not then revealed, except to the extent that telling an inconsistent story may mean supplying a story that can be checked while silence produces only a void.

It is true that the failure to mention facts at an earlier date does not impeach in quite the same manner as a prior inconsistent statement. If the witness has told discrepant stories, it is possible to place the two stories side by side and note that they cannot both be true. Of course, both stories can be true if facts are omitted so long as related facts conform. But the notion that the silence is sufficient to give rise to an inference of recent fabrication (since the facts would naturally have been mentioned if true), carries with it the idea that the silence is tantamount to a denial of those

84. *E.g.*, Coates v. People, 106 Colo. 483, 106 P.2d 354 (1940).
85. As noted in note 16 *supra*, several jurisdictions followed the "Michigan Rule" and admitted prior consistent statements if the making of the inconsistent statement was a disputed issue.
86. C. McCORMICK, EVIDENCE 68 (2d ed. 1972).
87. *E.g.*, Riney v. Vanlandingham, 9 Mo. 475, 477 (1846).
88. *See* the discussion in Gooderson, *supra* note 35, at 66-70, of an apparent recognition by Commonwealth courts of a rule that permits a defendant to offer a self-serving declaration made to the police. In many instances it may be said that the willingness of the defendant to tell the police a story and thus give them the opportunity to check it shows that nothing has been concealed.

facts. So construed, the silence seems virtually indistinguishable from a prior inconsistent statement.[89]

Should Rule 801(d)(1)(B) be read as authorizing the use of prior consistent statements when the witness has been impeached by a prior inconsistent statement? A "no" answer would mean that the courts were fettered by a distinction in the cases that has little to commend it. A "yes" answer would mean one of two things: Either the courts are free to depart from the strict letter of the earlier holdings when the policy of the rule calls for it; or the courts could admit the consistent statements, invoking the pre-Rules precedents that did so. The difficulty with the latter solution is that those decisions seem not to have conceptualized the admission of the statements as within the "recent fabrication" theory. The choice appears to be between rejecting statements that are admissible under the basic policy of Rule 801(d)(1)(B), and analytically the same as other statements received under the "recent fabrication" theory; or admitting such statements by giving the rule a construction that departs from the strict pre-Rules law.

The conclusion to which all of this points is that Rule 801(d)(1)(B) should be regarded as eliminating the hearsay objection to any prior consistent statements of a witness, and Judge Weinstein's apparent view that a sharp conflict in testimony opens the door to prior consistent statements by both witnesses goes far toward that conclusion. Not only does it push the notion of "rebuttal" beyond its common law limits but it finds a charge of improper motive in a situation in which it is unlikely that common law doctrine would have supported it.

There is, however, a possible objection to this conclusion that deserves a word. It may be contended that the facts in *Iaconetti* present a special case in that the defense theory of the case is that Lioi was lying to cover up his own attempt at bribing a government inspector. This being so, it might be thought that a charge of "improper motive" is more readily found in this case than in many other situations in which a prior consistent statement might be offered. If, for example, Iaconetti had persisted in his original story that he was joking, would there have been such an implied charge?

In fact, this limited reading of the case poses problems of its own. The notion of an implied charge of "improper motive" has to be defined in light of its place in a rule admitting prior consistent statements to rebut the charge. If the "improper motive" is Lioi's desire to cover up, surely that motive was present when he made the statements to his partner and attorney. The statements would

89. Wigmore seems to take the same view. *See* 4 J. WIGMORE, *supra* note 4, § 1129.

hardly blunt that sort of charge. It would seem, then, that this reading of the case does not place satisfactory limits on its holding. Even under this view, the decision gives new meaning to the language of Rule 801(d)(1)(B).

J.

It needs now to be considered whether Judge Weinstein's construction of Rule 803(24) does not provide an alternative theory to the admissibility of these statements that is preferable. Since the preceding analysis suggests that the use of Rule 801(d)(1)(B), although supported by the judgment behind that rule, does involve giving the language a new meaning, it might be best to give Rule 801(d)(1)(B) a more traditional reading and use Rule 803(24) to admit statements like those in *Iaconetti*.

Use of Rule 803(24) requires both that the standards for admissibility be met and that the notice requirement in that rule, which was carefully added by Congress, be satisfied. So far as the standards are concerned, there might appear to be no difficulty. The rule requires "equivalent circumstantial guarantees of trustworthiness" plus a judicial determination that

> (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point . . . than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.[90]

Taking these in order, it has already been explained that Rule 801(d)(1)(B) does not describe a class of prior consistent statements for which the on-stand opportunity is uniquely effective in eliminating the hearsay dangers. Assuming that Rule 801(d)(1)(B)'s terms are given a traditional meaning, that rule will not exempt from the hearsay ban many prior consistent statements for which the opportunity to test the declarant on the stand is just as effective. Hence, it might be contended that the guarantees of trustworthiness provided by such an opportunity are "equivalent" to those provided when the statements are within Rule 801(d)(1)(B).

It is true that the rule as proposed required only "comparable" guarantees, and that Congress changed the word to "equivalent"[91] at the same time that it added the other standards and the notice requirement.[92] Although linguistically "equivalent" seems a

90. FED. R. EVID. 803(24). *See* text accompanying notes 27-29 *supra*.
91. 56 F.R.D. 183, 303 (1973).
92. The Supreme Court Draft of FED. R. EVID. 803(24) was wholly deleted by the House Judiciary Committee. *See* H.R. REP. NO. 650, 93d Cong., 1st Sess. 5-6 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7079. The Senate

tougher standard than "comparable," as a practical matter there are few decisions that would have been affected had Congressional amending ended there. Under either word, Judge Weinstein's analysis in *Iaconetti* seems apt. Even if the statements are not made admissible under Rule 801(d)(1)(B), Lioi is available for cross examination and the statements were made early enough to minimize the risks of faulty memory and insincerity. To the extent that the availability of the declarant as a witness is an adequate guarantee of trustworthiness for purposes of Rule 801(d)(1)(B), the same availability would likely be "comparable" or "equivalent" when a prior consistent statement not covered by Rule 801(d)(1)(B) was offered under Rule 803(24).

There is a technical objection to this analysis. The reference is to "circumstantial" guarantees of trustworthiness equivalent (or, earlier, comparable) to those of the "foregoing exceptions," but insofar as statements are admitted by virtue of their being prior consistent statements of a witness, it is because such statements are excluded from the definition of "hearsay" and not because they fall within one of Rule 803's exceptions to the hearsay rule. The decision to treat a class of statements by a limitation on the definition and not by an exception was surely not wholly arbitrary. Admissions of a party opponent, traditionally considered an exception to the hearsay rule, are likewise treated by a limitation on the definition, and this choice seems to have been largely motivated by the fact that there was "[n]o guarantee of trustworthiness . . . required in the case of an admission."[93]

By the same token, prior statements of witnesses have not been treated as an exception because, unlike the exceptions, the guarantee of trustworthiness lies in the opportunity to cross examine the declarant in court and not in the circumstances of the statement's making. No circumstantial guarantees of trustworthiness need be shown for prior statements of a witness under Rule 801(d)(1)(A), (B), or (C). It might, therefore, be argued that Rule 803(24) only refers to statements (even prior consistent statements by witnesses) made under circumstances that guarantee their trustworthiness. Judge Weinstein's reference to the fact that Lioi's statements were made very soon after his February 10th meeting with Iaconetti[94] may amount to a search for such circum-

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Judiciary Committee reinstated the provision, *see* S. REP. NO. 1277, 93d Cong., 2d Sess. 18-20, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7065-66, and added all the present qualifications except the notice requirement, which the Conference Committee inserted, presumably as a compromise measure. *See* H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 11-12, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7105.

93. FED. R. EVID. 801(d)(2), Adv. Comm. Note.

94. 406 F. Supp. at 599.

stantial guarantees.

If this line of reasoning is adopted, then it is not every prior consistent statement that can be admitted under Rule 803(24). One ignores the statement's being made by a declarant who can now be cross examined, and looks for things such as the declarant's having labored under the impact of a startling event or the statement's having been against the declarant's interest when made. In some cases these circumstantial guarantees will be found; in others, they will not. Therefore, if this construction of Rule 803(24) is adopted, some pressure to give Rule 801(d)(1)(B) a broad construction not supported by tradition will remain. If this objection to a broad construction of Rule 803(24) is well-founded, the choice becomes a choice of rules to construe in a fashion that seems to play fast and loose with their language: Rule 801(d)(1)(B) or Rule 803(24).

Recognizing the objections to an expansive reading of the "guarantees" standard can produce bizarre results. Even if one heeds the warning of Professors Lempert and Saltzburg that several of the exceptions in Rules 803 and 804 are there for purely historical reasons and that "courts should not use exceptions of such questionable reliability as their benchmark for determining what circumstantial guarantees of trustworthiness are equivalent to established exceptions,"[95] the quality of the guarantee provided by these exceptions varies widely and none of them seems to provide guarantees as good as those provided by the cross examination of the declarant under Rule 801(d)(1)(B).[96] If, therefore, this were the only obstacle to using Rule 803(24) for all prior consistent statements by a witness, it might be removed.

Congress, of course, added other hurdles to getting statements past Rule 803(24), fearing that otherwise the exception could swallow the hearsay rule, but apart from the requirement that notice be given of an intent to use the exception, the requirements do not seem terribly onerous. Judge Weinstein's construction of the requirement that the statement be offered as evidence of a material fact saves the phrase from absurdity, but does not convert it into a meaningful screen.[97] As a pure matter of relevancy the fact must be of sufficient importance to warrant the statement's being re-

95. R. LEMPERT & S. SALTZBURG, *supra* note 70, at 477.

96. It is not wholly clear which exceptions Professors Lempert and Saltzburg would exclude as benchmarks, but consider the quality of the guarantees afforded by spontaneous utterances or declarations of mental state. Perhaps the best guarantees are afforded by recorded recollection, but only because cross examination of the declarant may be possible since the declarant is necessary to lay the proper foundation.

97. If the word "material" were given the more common meaning that the fact must be provable in the action, it would add nothing to FED. R. EVID. 401, but

ceived, and it is hard to go much beyond that. Likewise, the requirement that the statement be more probative than any other evidence that may be procured through reasonable efforts is an element of the relevancy evaluation.[98] If counsel can with reasonable efforts produce more potent stuff, he is likely to do so. Finally, it is difficult to imagine very many cases in which a judge otherwise satisfied that the evidence should be admitted would decide that the interests of justice would not be served thereby.

K.

The requirement of pretrial notice in Rule 803(24) coupled with the objection discussed above, may seem to limit the utility of Rule 803(24) in resolving the problems discussed earlier in connection with Rule 801(d)(1)(B). That rule could be given a narrow construction, one tracking closely the pre-Rules law, but Rule 803(24) would be available for receiving any other prior consistent statements that were relevant. Yet the notice requirement may make it impossible to introduce the statements in any case in which it has not been complied with. Accordingly, Judge Weinstein's handling of the problems posed by the lack of notice is significant. It was this portion of his opinion that received the endorsement of the second circuit,[99] and in a subsequent case the fifth circuit approved the admission of a prior inconsistent statement that did not meet Rule 801(d)(1)(A)'s requirements under Rule 803(24), without even mentioning the notice requirement.[100]

Two conceivable purposes underlie this provision. First, the opponent may be given an opportunity to locate and produce the declarant himself. Second, the opponent will be better able to prepare to meet the out-of-court declaration. When the declaration was by a person who is a witness at trial, the first purpose seems largely satisfied. To the extent that there remains the objective of giving the opponent an adequate opportunity to prepare,

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even under Judge Weinstein's construction it is doubtful that it would exclude much.

98. *See* FED. R. EVID. 403, Adv. Comm. Note, which provides:

> In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. See Rule 106[105] and Advisory Committee's Note thereunder. The availability of other means of proof may also be an appropriate factor.

99. 540 F.2d at 578.

100. United States v. Williams, 573 F.2d 284 (5th Cir. 1978). The *Williams* case also carries forward a pre-Rules holding that a prior consistent statement may be admitted even though it was made after the alleged motive to fabricate arose. Such cases are inconsistent with a construction of Rule 801(d)(1)(B) that would limit it to statements that are probative in rebutting the charges made.

it would seem that any preparation made to deal with the declarant as witness should suffice to prepare to meet the consistent statement as well.[101]

Although it should not be concluded that the notice requirement in Rule 803(24) is a dead letter, it does look very much as though it may not be as serious an obstacle to the admission of prior consistent statements of a witness as might first appear unless counsel opposing the statement can make a convincing showing of surprise, or the judge believes that the proponent of the statement was deliberately playing games with the court and opposing counsel. With the notice requirement being given such a reduced role, Rule 803(24) would seem readily available in theory for admitting the statements.

IV. CONCLUSION

The above analysis may appear to be an unbridled extrapolation from a single case, and, in a sense, it is. Of course, Judge Weinstein, as a drafter of the Federal Rules and one of the leading authorities on them by virtue of his treatise, is not the usual District Judge, and with the second circuit and fifth circuit concurring, at least in part, such an extrapolation may not be as hazardous as it usually is. Not only is it possible to demonstrate good reasons for Judge Weinstein's innovative approach, but the Rules themselves invite that approach. The articulation of general principles intended to guide the evaluation of the probative worth of a piece of evidence invites a new inquiry into the worth of prior consistent statements as well as the risks involved in admitting them. The evident decision that at least *some* prior consistent statements do not pose any serious hearsay dangers invites an inquiry into whether *any* prior consistent statements pose those dangers. The imprecision of the judicial doctrine alluded to in Rule 801(d)(1)(B) invites the use of manipulation to achieve more fundamental objectives, and Rule 803(24), despite congressional amendments, invites courts to use it when prior consistent statements are offered. Whether the approach of Judge Weinstein in the *Iaconetti* case will gain unanimous backing only time can tell.

101. In *Iaconetti*, for example, counsel did not claim any inability to defend against the statements, and it is hard to imagine that he would have tried the case much differently if he had received earlier notice. In many instances, of course, opposing counsel will be fully aware of the prior statements. Where discovery devices permit interrogation of the witness, it can be the easiest step to ask, routinely, if the witness mentioned his story to others.